



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

AEG
Docket No. 6801-99
30 May 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF EX-AR [REDACTED], USN,
[REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, applied to this Board requesting, in effect, that his naval record be corrected to show that on 20 January 1998 he received an honorable discharge by reason of best interest of the service and an RE-1 reenlistment code, instead of the void enlistment due to erroneous enlistment and RE-4 reenlistment code actually issued on that date.

2. The Board, consisting of Mr. Pfeiffer and Ms. Hare and Davies, reviewed Petitioner's allegations of error and injustice on 23 May 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. On 24 June 1997 Petitioner completed a "Report of Medical History" (Standard Form [SF] 93). At that time, he denied prior suicide attempts or alcohol abuse. He admitted that he had suffered from asthma as a child. Concerning prior drug use, Petitioner stated that he had used marijuana 150 times, cocaine four times and LSD twice, but that all such use ceased in January 1995. He also admitted that he had been enrolled in a drug and alcohol rehabilitation program in 1995, which he had successfully

completed. He denied any other prior mental treatment, or significant medical treatment within the past five years.

d. Petitioner's "Report of Medical Examination," (SF 88) also contained the foregoing information, and referred to a letter from the coordinator of the rehabilitation program which stated that Petitioner's treatment had consisted of two months of outpatient treatment and three months of "continuing care." On 26 June 1997 Petitioner completed a "Questionnaire for National Security Purposes" and a "Record of Military Processing-Armed Forces of the United States" (DD Form 1966), on which he disclosed substantially the same information relating to past drug use.

e. It appears that the examining physician had some question as to whether Petitioner should be enlisted given his prior drug abuse because, on 16 September 1997, he sent Petitioner for an independent evaluation by another military physician, which was performed on the same day. The second doctor's hand-written comments read as follows:

18 year old man used "weed" (marijuana) for one month in 10th grade in 1995. Mother put him in . . . drug program- was out patient only for 5 months. He benefited. No further drug use-no alcohol-not drug dependent, no desire or craving. Has good family, school, work history.

Mental status exam does not indicate any evidence of psychosis, neurosis, behavior disorder, drug or alcohol abuse or unlawful conduct.

This doctor concluded his brief report by stating that no diagnosis was appropriate under the criteria set forth in the Fourth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), and further stated that "I believe this man can adjust to military life." Apparently based on the foregoing, Petitioner was granted an enlistment waiver for his drug use. A similar waiver was granted for his prior respiratory problem.

f. Petitioner then enlisted in the Delayed Entry Program (DEP) of the Naval Reserve on 17 September 1997. On 23 December 1997 Petitioner was discharged from the DEP and enlisted in the Navy. Apparently on that same day, he reported for duty under instruction to the Recruit Training Command, Naval Training Center, Great Lakes, IL.

g. Petitioner then served without incident for about ten days. However, on 2 January 1998, he was referred for evaluation due to questions about his asthma and a head injury he suffered in a pre-service automobile accident. On 6 January 1998 Petitioner was seen by a clinical psychologist in the recruit evaluation unit, who diagnosed him with an occupational problem. However, the psychologist also stated that he was not suicidal,

his mental status was essentially normal and he should be returned to duty.

h. On 9 January 1998 Petitioner was admitted to the mental health unit of the servicing naval hospital due to suicidal ideation and was evaluated by a Navy psychiatrist, whose evaluation report reads, in part, as follows:

IDENTIFYING INFORMATION: The patient is an 18-year-old, single, white male . . . who complains of "I just can't take it here anymore."

HISTORY OF PRESENT ILLNESS . . . The patient states that since he got here, he has been becoming increasingly depressed with some difficulty sleeping and poor concentration. He states that he feels that he needs to be home with his support system. The patient states he would not do well in the Navy and that he gradually began feeling worse and the week prior to admission started having intermittent thoughts of suicide. The patient spoke with his chief who told him "not to worry about (it)." The patient stated that two days prior to admission he went to the REU and was told that he was fit for full duty. His thoughts of suicide increased and on the of admission (sic) the patient wrote a suicide note and stated he had thoughts of hurting himself with plans to poison himself or hang himself. This was found by the RDC (recruit division commander) and the patient was brought to the Emergency Room (and) . . . subsequently admitted.

PAST PSYCHIATRIC HISTORY: The patient has an extensive past psychiatric history of being treated with Ritalin for attention deficit hyperactivity disorder (ADHD) when he was in 4th grade to 7th grade. After that time the patient stated he was diagnosed with some "sort of depression" and tried on numerous medications . . . Patient states "none of these helped very much." Patient also was in an outpatient rehab program when he was approximately 16 years old. Patient was also admitted one time for suicidal ideation for approximately one week, approximately one year ago. The patient denies any past suicide attempts.

HABITS: The patient states that he drinks several times per week, several beers at a time and in high school had drank nearly every day at times. Patient states that he has a tolerance but denied withdrawal. He admits that he has drank more than intended and has had difficulty cutting down. He has often driven while intoxicated. Patient has gotten into difficulties while drinking but has continued to drink despite that. The patient also admits to having smoked pot in the past every day at time with tolerance, but no withdrawal. He also admits to smoking marijuana "out of control" and smoking more than intended over a greater period of time and having a difficult time cutting

down. The patient states the last time (he) smoked was approximately one year ago. Patient also admits to cocaine use. Snorting cocaine up to daily and selling drugs in order to support his habit. Again he admits to tolerance but denied any withdrawal. Also admitted to snorting cocaine more than intended over a greater period of time and being unable to cut down. The patient has also experimented with numerous other drugs in the past such as LSD, mushrooms, and barbiturates. Patient denied any IV (intravenous) drug use. The patient admitted to numerous times selling drugs but denied stealing to support his habit . . .

DEVELOPMENTAL HISTORY: . . . Throughout his high school he started getting involved with drugs and then went to the rehab. The patient was also treated for depression at this time. The patient was sent away to numerous boarding schools and was asked to leave over five or six times. The patient often got in trouble in these and "had a problem with authority." The patient denied any legal trouble or jail time spent. The patient finally obtained his high school diploma at a public school before joining the military. The patient gives a long history of feelings emptiness and "lacking direction." Patient states "I'm extremely impulsive." The patient has gotten into numerous fights, one of which recently where he smacked a guy's head against the floor numerous times. Patient states that he has inappropriate anger and gets angry over "little things." The patient states he . . . (goes) from suicidal to very happy within minutes. The patient has exhibited numerous hazardous behavior such as his drug use, selling drugs, and driving under the influence of drugs and alcohol. . .

MENTAL STATUS EXAMINATION: . . . The patient's thought content was without current suicidal ideation or homicidal ideation. There was no evidence of psychosis . . . The patient's insight was poor into the contributions to his many difficulties and drug use. The patient's judgment and impulse control were impaired by his history of heavy drug (abuse), frequent fights and dangerous activities.

Based on this evaluation, Petitioner was diagnosed with alcohol dependence, cocaine and marijuana (cannabis) dependence "in full sustained remission," and a borderline personality disorder. Expeditious separation was recommended because "if allowed to continue on active duty, he represents a continuing risk of harm to himself and/or others."

i. On 13 January 1998 administrative separation action was initiated "by reason of defective enlistment and induction due to erroneous enlistment as evidenced by medical evaluation of alcohol/cannabis/cocaine dependence and also as evidenced by a borderline personality disorder." On that same day Petitioner

waived all of his procedural rights, including the rights to consult counsel and submit a statement in response to the proposed separation. On 14 January 1998 the discharge authority directed separation with a void enlistment by reason of defective enlistment and induction due to erroneous enlistment. On 20 January 1998 Petitioner's enlistment was voided and he was released from the custody and control of the Navy. The Certificate of Release or Discharge from Active Duty (DD Form 214) issued on that date reflects a "void enlistment" by reason of "erroneous entry, drug abuse," and a reentry code of "RE-4."

j. In support of his application, Petitioner has submitted documentation that shows he is now attending a community college and has a part time job. He also has submitted an evaluation from a clinical psychologist, dated 23 July 1999, which states, in part, as follows, concerning what Petitioner told him about his background:

When he was in the fifth grade, his teachers noted some inattentiveness and he was formally evaluated and felt to have (ADHD). He was placed on Ritalin and stayed on it until the end of his 8th grade year. Both he and his father said that it made a modest difference and his grades improved . . .

During his 10th grade academic year, (Petitioner) began having difficulties. His parents had him evaluated and he was found to be abusing drugs. Those drugs included alcohol, marijuana, cocaine, and some kind of pill (he did not remember what) . . .

From the 10th grade thru and including the 12th grade, (Petitioner) saw a psychiatrist . . .for counseling with a specific focus for help with the (ADHD).

The psychologist went on to note as follows what Petitioner told him about his psychiatric evaluation at recruit training:

. . . (Petitioner) was open in saying that he had exaggerated some things to the . . . psychiatrist, most notably that he had been in a fight when he never had been in such a fight. (Petitioner) also said that he told the psychiatrist that he had a previous hospitalization for suicidal ideation when he did not have such a hospitalization. The remainder of the things noted in the inpatient discharge summary are simply not true . . .

The psychologist went on to opine that Petitioner was not suicidal at Great Lakes, was not drug dependent at that time, and did not have a personality disorder.

k. The Bureau of Medicine and Surgery's Specialty Advisors for Psychiatry were then asked whether the evidence supports the 9 January 1998 diagnoses of drug and alcohol dependence and

personality disorder. In letters of 19 April and 1 May 2000, the Specialty Advisors opined that Petitioner did not and does not have a personality disorder, but "was more likely suffering from Adjustment Disorder . . ." They further concluded that he "was not drug or alcohol dependent prior to his enlistment."

1. Department of Defense Directive (DODD) 6130.3 sets forth physical criteria for appointment and enlistment in the armed forces and states that drug or alcohol dependence is disqualifying, as is a personality disorder under some circumstances. The directive also states in part, as follows concerning other causes for rejection:

Alcohol Abuse. Use of alcoholic beverages that leads to misconduct, unacceptable social behavior, poor work or academic performance, impaired physical or mental health, lack of financial responsibility, or a disrupted personal relationship . . .

Specific Academic Skills Defects. Chronic history of academic skills or perceptual defects secondary to organic or functional mental disorders that interfere with work or school after age 12. Current use of medication to improve or maintain academic skills . . . is disqualifying.

m. 10 U.S.C. § 978(a) states that an individual must be evaluated for drug and alcohol dependency prior to enlistment or within 72 hours after enlistment. § 978(c) requires that an individual found dependent in accordance with § 978(a) either be denied entrance into the armed forces or be separated with a void enlistment. Article 1910-308 of the Naval Military Personnel Manual (MILPERSMAN) authorizes a void enlistment in certain other situations, but none of them are applicable to Petitioner.

n. MILPERSMAN Articles 1900-010 and 1910-308 essentially state that a separation initiated within the first 180 days of active duty will normally be described as an entry level separation (ELS) and not as a characterized discharge. An honorable discharge is appropriate in these circumstances only if it "is clearly warranted by the presence of unusual circumstances involving personal conduct and performance . . ."

o. MILPERSMAN Article 1910-130 authorizes separation by reason of erroneous enlistment. Such a separation is appropriate if it would not occurred had certain relevant facts been known, there was no fraud on the part of the individual, and the defect is materially unchanged. An individual may receive a characterized separation, an ELS or a void enlistment, depending on the circumstances of the case.

p. MILPERSMAN Article 1910-164 authorizes separation in the best interest of the service (BIOTS). Such a separation may be directed by the Secretary of the Navy if he or she determines that separation from the service is, in fact, in the best

interest of the service, but the individual does not meet the criteria for any other reason for separation. A characterization of service of either honorable or general is authorized, unless an ELS is required.

q. Enclosure (3) to Bureau of Naval Personnel Instruction (BUPERSINST) 1900.8 states that an RE-R1 reenlistment code means the recipient is recommended for preferred reenlistment. An RE-1 code indicates that the individual is eligible for reenlistment. The RE-4 code means "not recommended for reenlistment." Enclosure (2) to the directive indicates that an individual in Petitioner's situation who is separated due to BIOTS, or "secretarial authority," may be issued a reenlistment code of RE-R1, RE-1 or RE-4.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. Specifically, the Board believes that the reason for separation and void enlistment must be changed, but the reenlistment code should remain the same.

Concerning the reason for separation, erroneous enlistment, the Board notes that according to Petitioner, he exaggerated his pre-service drug and alcohol abuse in the hope that such misrepresentations would result in his separation. Clearly, that is exactly what happened. Normally, the Board looks askance at a request to change some facet of a discharge under such circumstances, concluding that an individual who obtains a discharge by fraud should not benefit from the fraud when it is discovered. *Weir v. United States*, 200 Ct.Cl. 501, 474 F.2d 617 (1973); *cert. denied* 414 U.S. 1066 (1973). However, according to the advisory opinions, even these exaggerated versions of his pre-service abuse should not have resulted in diagnoses of alcohol or drug dependence. Accordingly, Petitioner should not have been separated by reason of erroneous enlistment based on those diagnoses.

The Board cannot rule out the possibility that Petitioner's enlistment was erroneous for other reasons. He clearly suffered from ADHD through the 12th grade, and the pertinent section of DODD 6130.3 indicates that this disorder may be disqualifying for enlistment. Additionally, contrary to what he told the recruiting officials, Petitioner had a pre-service problem with alcohol abuse, which also might have kept him from enlisting. However, the Board notes that neither of these potential bases for separation by reason of void enlistment was cited in the notification letter of 13 January 1998, and the record does not clearly indicate that either of these problems would be disqualifying. Accordingly, the Board believes it would be inappropriate at best and improper at worst to leave the reason for separation as erroneous enlistment based on a belief that he could have been so processed due to his history of ADHD and

alcohol abuse. Based on the foregoing, and since no other reason for separation appears to be appropriate, the Board concludes that the reason for Petitioner's separation should be changed to BIOTS.

The Board also concludes that Petitioner's void enlistment must be changed. In this regard, the Board initially notes that § 978 only authorizes such a separation if the individual is diagnosed as drug or alcohol dependent within 72 hours. Petitioner began his period of active service on 23 December 1997 and was not so diagnosed until 9 January 1998, a period of more than two weeks. Accordingly, even if the diagnoses of drug and alcohol dependence were correct, which it appears they were not, his enlistment should not have been voided. Additionally, the reason for Petitioner's separation will be changed to BIOTS, and the MILPERSAMN indicates that an enlistment may not be voided for this reason. An individual separated for BIOTS must receive either a characterized separation or an ELS. Since separation action was initiated against Petitioner within the first 180 days of service, and neither his conduct nor performance was especially meritorious, an ELS is the appropriate type of separation, and not the honorable discharge requested by Petitioner.

Despite the foregoing, the Board also concludes that Petitioner's RE-4 reenlistment code should not be changed. In this regard, the Board first notes that such a code is specifically authorized when an individual is separated by reason of BIOTS. Further, at the time of his enlistment, Petitioner failed to disclose his history of treatment for ADHD and his alcohol abuse as he should have. Either of these conditions might have resulted in rejection of his enlistment application. The Board is also greatly disturbed by the fact that Petitioner was very unhappy in recruit training, could not adjust to the military, and did everything he could to be separated. During the in-service psychiatric evaluation, Petitioner exaggerated his pre-service alcohol and drug use and falsely stated that he had attempted suicide prior to enlistment. Additionally, in another attempt to ensure he was discharged, he wrote a false suicide note. Based on the foregoing, as well as his admitted history of pre-service drug and alcohol abuse, the Board concludes that Petitioner is not a good candidate for further military service despite his good post-service adjustment, and the RE-4 reenlistment code should not be changed.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 20 January 1998 Petitioner received an entry level separation by reason of best interest of the service instead of the void

enlistment by reason of erroneous enlistment actually issued on that date.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

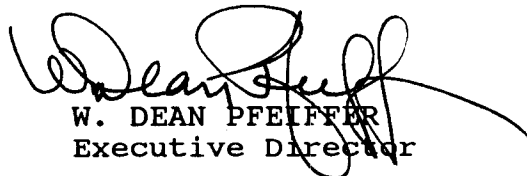
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6e of the Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6[e], and having ensured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the provisions of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director